FILE COPY

MAR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 753

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *Petitioner*,

v.

ALABAMA, EX REL. JOHN PATTERSON.

No. 674 Misc.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *Petitioner*,

v.

HONORABLE J. ED. LIVINGSTON, CHIEF JUSTICE OF THE SUPREME COURT OF ALABAMA, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI AND/OR PETITION FOR WRIT OF MANDAMUS TO THE SUPREME COURT OF ALABAMA

ROBERT L. CARTER,
20 West 40th Street,
New York, N. Y.,

THURGOOD MARSHALL,
10 Columbus Circle,
New York, N. Y.,

ARTHUR D. SHORES,
1630 Fourth Avenue, North,
Birmingham, Alabama,
Attorneys for Petitioner.

CHARLES L. BLACK, JR.,
WILLIAM T. COLEMAN, JR.,
FRED D. GRAY,
GEORGE E. C. HAYES,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
LOUIS H. POLLAK,
FRANK D. REEVES,
WILLIAM TAYLOR,
Of Counsel.

INDEX

	PAGE
MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS	1
PETITION FOR WRIT OF CERTIORARI AND OR PETITION FOR WRIT OF MANDAMUS	3
Opinions Below	4
Jurisdiction	4
Questions Presented	5
Statement	5
Reason for Allowance of the Writ	6
Conclusion	9

INDEX TO APPENDICES

Order and Decree of Supreme Court of Alabama	11
Opinion of Supreme Court of Alabama	12

Table of Cases

City National Bank v. Hunter, 152 U. S. 512	5
Ex Parte Bradley, 7 Wall 364, 376	5
Hovey v. Elliott, 167 U. S. 409	9
McCargo v. Chapman, 20 How. 555, 557	5
National Union of Marine Cooks v. Arnold, 348 U. S. 37, 43	9
Re Metropolitan Trust Co., 218 U. S. 312	5

IN THE

Supreme Court of the United States

October Term, 1958

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation,

Petitioner,

v.

STATE OF ALABAMA, *ex rel.* JOHN PATTERSON,

Attorney General.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Now comes petitioner and moves this Court for leave to file the annexed petition for writ of mandamus under Title 28, United States Code, § 1651(a) and further moves that an order and rule be entered and issued directing the Supreme Court of the State of Alabama, the Honorable J. Ed Livingston, Chief Justice of the Supreme Court of Alabama and the Honorable Thomas S. Lawson, Robert T. Simpson, Davis S. Stakely, John L. Goodwin, Pelham J. Merrill and James S. Coleman, Associate Justices of the Supreme Court of Alabama, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition and why your petitioner should not have such other and further relief in the premises as may be just and meet.

Petitioner states that the motion for leave to file and the petition for writ of mandamus annexed hereto are made as alternatives to the petition for writ of certiorari also annexed hereto which invokes the court's jurisdiction under Title 28, United States Code, § 1257(3) and is made in the event that the Court finds it more appropriate to exercise its jurisdiction by granting the writ of mandamus than by proceeding pursuant to certiorari.

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,

THURGOOD MARSHALL,
10 Columbus Circle,
New York 19, New York,

ARTHUR D. SHORES,
1630 Fourth Avenue, North,
Birmingham, Alabama,
Attorneys for Petitioner.

CHARLES L. BLACK, JR.,
WILLIAM T. COLEMAN, JR.,
FRED D. GRAY,
GEORGE E. C. HAYES,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
LOUIS H. POLLAK,
FRANK D. REEVES,
WILLIAM TAYLOR,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1958

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation,

Petitioner,

v.

STATE OF ALABAMA, *ex rel.* JOHN PATTERSON,
Attorney General.

PETITION FOR WRIT OF CERTIORARI AND/OR PETITION FOR WRIT OF MANDAMUS TO THE SUPREME COURT OF ALABAMA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that pursuant to Title 28, United States Code, § 1257(3), a writ of certiorari issued to review the judgment of the Supreme Court of Alabama entered in the above entitled cause on February 12, 1959 and in the alternative, petitioner prays that pursuant to Title 28, United States Code § 1651(a), a writ of mandamus issue to the Supreme Court of Alabama and to the Honorable J. Ed Livingston, Chief Justice of the Supreme Court of Alabama and the Honorable Thomas S. Lawson, Robert T. Simpson, Davis S. Stakely, John L. Goodwin, Pelham J.

Merrill and James S. Coleman, Associate Justices of the Supreme Court of Alabama, directing and requiring the said Honorable J. Ed Livingston, Thomas S. Lawson, Robert T. Simpson, Davis S. Stakely, John L. Goodwin, Pelham J. Merrill and James S. Coleman to send down the mandate of this Court in this cause to the Circuit Court of Montgomery County and to order, direct and require that court to proceed to hold a hearing to determine on its merits the validity of the *ex parte* temporary restraining order and injunction, still in effect against petitioner, issued on June 1, 1956 barring petitioner from further activities in the state.

Opinions Below

On June 30, 1958, this Court handed down its opinion in this case reversing and remanding the decision of the Supreme Court of Alabama entered on December 6, 1956. 357 U. S. 449. On August 1, 1958, the mandate of this Court was sent down to the Supreme Court of Alabama (R. 32). On February 12, the Court below filed its opinion overruling petitioner's motion to send the mandate down and again affirmed the judgment of the Circuit Court of Montgomery County adjudging petitioner in contempt (R. 44). That opinion is set forth in the appendix here, *infra*, at page 11.

Jurisdiction

The judgment of the Supreme Court of the State of Alabama was entered on February 12 and a copy thereof is appended to this petition in the appendix at page 15, *infra*. Jurisdiction of this Court is invoked under Title 28, United States Code, § 1257(3). Jurisdiction is also invoked under Title 28, United States Code, § 1651(a), to aid in the exercise of this Court's appellate jurisdiction over state

courts granted under Title 28, United States Code, § 1257(3). Such jurisdiction has been exercised to secure compliance with a prior mandate of this Court, *City National Bank* v. *Hunter*, 152 U. S. 512; *Re Metropolitan Trust Co.*, 218 U. S. 312, and as a means of furthering justice in other kindred ways. *McCargo* v. *Chapman*, 20 How. 555, 557; *Ex Parte Bradley*, 7 Wall 364, 376. Exercise for either or both reasons would be appropriate in this case.

Questions Presented

1. May the Supreme Court of Alabama refuse to send down the mandate of this Court under the circumstances of this case?

2. May petitioner be deprived of access to the courts of Alabama to test the validity of an *ex parte* order, in effect ousting it from the state as a punishment for contempt, thereby rendering the *ex parte* temporary restraining order a permanent injunction, without petitioner's having been granted the right to a hearing in accord with requirements of due process of law?

Statement

This proceeding began on June 1, 1956 on the complaint of the then Attorney General, John Patterson. An *ex parte* order issued in effect forbidding petitioner from conducting any further business in the State of Alabama. The facts are set out in the opinion of this Court at 357 U. S. 449, and need not be repeated here.

On August 1, 1958, the mandate of this Court was sent down to the Supreme Court of Alabama (R. 32). On November 5, 1958, petitioner filed a motion in the Supreme Court of Alabama requesting it to forward this Court's

mandate to the Circuit Court of Mortgomery County. In this motion it recited that petitioner had been barred from doing business in Alabama since 1956 and that as long as the Circuit Court of Montgomery County had not received the mandate of this Court, petitioner would be barred from access to the courts of Alabama to contest on the merits the vital constitutional issues raised in this litigation (R. 34). On November 19, the petitioner renewed its motion (R. 36) and again on December 19 (R. 38). On February 12, the Court issued its order and judgment overruling the motion and affirming the judgment of the Circuit Court after remand (R. 44). The basis for the refusal of the Supreme Court of Alabama to follow the mandate of this Court is on the ground that the decision of this Court rests upon a mistaken premise. It is pointed out that petitioner was held in contempt for its "willful and deliberate refusal to produce the documents described in the former order of [the Circuit Court of Montgomery County] in this cause" and that there is nothing in the record upon which "to bottom a conclusion that petitioner has complied satisfactorily with the production order except for the membership lists".

Reason for Allowance of the Writ

1. The record in the Supreme Court of Alabama in this case and in this Court before remand was the petition for writ of certiorari filed by petitioner in the Supreme Court of Alabama (R. 1). In that record, petitioner recites that the court issued an interlocutory order and decree requiring petitioner to produce certain of the documents requested in the state's motion (R. 5). The interlocutory decree was set out (R. 19). The petition states that petitioner filed a motion to set aside the order to produce, which motion was overruled on July 25, 1956 (R. 7); upon its advising the court that petitioner was unable to comply, the court found and adjudged petitioner in contempt and levied a fine in

punishment therefor. The court's order is set out in the record (R. 7). On July 30, petitioner filed a motion to set aside or stay execution of the order pending review and with that motion tendered compliance with the court's order, except that it refused to give up its membership lists (R. 9-10). The petition recites specifically the action taken by petitioner in its effort to comply with the court's order except for filing its membership lists (R. 9-10). Despite this tender of July 30 in substantial compliance with the order, the court overruled petitioner's motion to set aside or modify its adjudication of contempt and refused to stay execution of its judgment pending review (R. 22). On July 31, it adjudged petitioner in further contempt (R. 12).

In its brief filed here the state stated at page 7:

> "Upon July 30, 1956, petitioner filed, with the trial court, a motion to set aside or stay execution of the contempt decree pending review by the Supreme Court of Alabama. Petitioner also tendered miscellaneous documents which it alleged to be substantial compliance. At all times the corporation refused to produce the names and addresses of its members. This motion was denied and petitioner then filed a motion in the Supreme Court of Alabama, requesting stay of execution of the judgment below pending review by the appellate court. * * *" (Brief and Argument for Respondent, page 7.)

In its opinion entered on December 6, 1956, dismissing the petition for writ of certiorari, the Supreme Court of Alabama stated: "On the last day that petitioner had to comply with the court's order or suffer the fine to be raised for refusing to comply, the petitioner offered to bring some of the documents into court but refused to fully comply with the order to produce. This offer of partial compliance by the petitioner was not accepted by the court. There-

after the court decreed that the fine be raised. * * * " (R. 24).

The record, therefore, conclusively establishes a basis for this Court's holding that the petitioner sought to comply with the court's order but for its membership lists and that the July 31 order of further contempt (R. 12) was based upon petitioner's refusal to supply the names and addresses of its members to the Attorney General. The holding below, therefore, that this Court misconceived the facts in issue here is not supported by the facts.

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

2. The mandate of this Court has been in the Supreme Court of Alabama since August 1, and despite repeated motions by petitioner that Court refused (and failed) to send the mandate to the circuit court or otherwise act upon the mandate until February 12. Thus, between August 1, and February 12, a period of 5½ months, the Supreme Court of Alabama delayed further proceedings in this case and specifically refused to grant petitioner's motion to send this Court's mandate down to the circuit court so that petitioner could proceed to a hearing on the merits. On August 19, 1958 petitioner filed motions to set the matter down for hearing and to dissolve the restraining order in the Circuit Court of Montgomery County. No action on either motion has been taken by the circuit court as of the filing of this petition.

Petitioner has been and will continue to be denied access to the courts in the State of Alabama. It sought a hearing on the merits by filing the aforesaid motions in the circuit court and by requesting the Supreme Court of Alabama to send this Court's mandate down without delay. Petitioner has been effectively barred from operating in the state since June 1, 1956, without a hearing, a period of close to

three years. This case presents serious and grave due process considerations. See *Hovey* v. *Elliott*, 167 U. S. 409. In *National Union of Marine Cooks* v. *Arnold*, 348 U. S. 37, 43, this Court quoted with approval the language in *Hovey* v. *Elliott* to the effect that under the due process clause an inherent right of defense was secured against proscription as a punishment for contempt. That question is explicitly present here.

The history of this case makes obvious the fact that various stratagems, technicalities, distortions of fact and unvarnished delays have been applied and will continue to be applied in Alabama to frustrate petitioner's right to test the validity of its *ex parte* ouster in the courts of Alabama and to seek a review of this holding, if necessary, in an appropriate appellate court.

Unless this petition for writ of mandamus is granted, a hearing to test the validity of the *ex parte* so called temporary restraining order, the probability is that three years hence petitioner will still be effectively banned from Alabama without having been allowed to test the *ex parte* order on its merits.

Conclusion

WHEREFORE, for the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari should be granted and/or a writ of mandamus issue from this Court to the Supreme Court of Alabama and the Honorable J. Ed Livingston, Chief Justice of the Supreme Court of Alabama and the Honorable Thomas S. Lawson, Robert T. Simpson, Davis S. Stakely, John L. Goodwin, Pelham J. Merrill and James S. Coleman, Associate Justices of the Supreme Court of Alabama, requiring said Chief Justice and Associate Justices to show cause on a date to be fixed by this Court why a writ of mandamu

should not issue requiring and directing them to follow and send down the mandate of the Supreme Court of the United States in this cause to the Circuit Court of Montgomery County and ordering that court to proceed without delay to grant petitioner a hearing on the merits.

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,

THURGOOD MARSHALL,
10 Columbus Circle,
New York 19, New York,

ARTHUR D. SHORES,
1630 Fourth Avenue, North,
Birmingham, Alabama,

Attorneys for Petitioner.

CHARLES L. BLACK, JR.,
WILLIAM T. COLEMAN, JR.,
FRED D. GRAY,
GEORGE E. C. HAYES,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
LOUIS H. POLLAK,
FRANK D. REEVES,
WILLIAM TAYLOR,
Of Counsel.

Appendix

Order and Decree of Supreme Court of Alabama of February 12, 1959

WHEREAS, the decree and order of this Court denying the Writ of Certiorari and Dismissing the Petition rendered on December 6, 1956, was reversed by the Supreme Court of the United States and the cause remanded to this Court for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, as shown by the Mandate of the Supreme Court of the United States issued to this Court on August 1, 1958.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED, AND DECREED, since there is nothing in the record before this Court upon which this Court can base a conclusion that the Petitioner has apparently complied satisfactorily with the production order, except for the membership lists [it having been ruled the lists could not be required], and it being clear that the Petitioner is still in contempt for its failure to produce other "certain books, papers and documents" described in the lower court's order, that the judgment and decree of the Circuit Court, In Equity, be and is affirmed after remandment.

IT IS FURTHER CONSIDERED AND ORDERED that Petitioner's motion, praying that this Court will cause to be sent to the Circuit Court of Montgomery County, Alabama, the Mandate of the Supreme Court of the United States so that the Petitioner may proceed to have a hearing on the merits of the injunction issued by said Circuit Court, be and is hereby overruled.

IT IS FURTHER ORDERED that the costs of these proceedings be and are hereby taxed against the Petitioner, National Association for the Advancement of Colored People, a Corporation, for which costs let execution issue accordingly.

Opinion of Supreme Court of Alabama, Filed February 12, 1959

Per Curiam.

This cause comes before this tribunal on mandate from the Supreme Court of the United States, 357 U. S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163; this Court having previously denied certiorari, but having expressed its views as to the merits of the petitioner's claim of a constitutional right to refuse production of its membership lists. 265 Ala. 349, 91 So. 2d 214.

While the Supreme Court of the United States, in its opinion supra, seems to recognize its lack of jurisdiction over matters of state ("nonfederal") procedure, it nevertheless assumed jurisdiction quoad hoc ("for this turn", as that phrase has been sometimes defined), and this upon the premise that the interpretation by this Court of its own procedural rules was erroneous, or that petitioner was not sufficiently apprised of this Court's "novel" interpretation of those rules in the decision under review.

Lest there be no misapprehension on the part of the bench and bar of Alabama, we here reaffirm the well recognized and uniform pronouncements of this Court with respect to the functions and limitations of common-law certiorari, and the distinctions between that and other methods of review. 265 Ala. 349, supra. As we stated in *American Federation of State, County and Municipal Employees* v. *Dawkins*, 268 Ala. —, 104 So. 2d 827: "We cannot hurdle or make shipwreck of well known rules of procedure in order to accommodate a single case."

The decision of the Federal Supreme Court seems to have proceeded upon a hearing there, upon consideration of allegations there made, and upon showings or evidentiary matters and contentions, much of which were never before

this Court. It thereupon reversed the judgment of this Court and remanded the case for further proceedings "not inconsistent with" the opinion of that Court.

The first question before this Court on original consideration was whether or not there existed a prima facie right of refusal on the part of the petitioner. *Ex parte Boscowitz*, 84 Ala. 463, 4 So. 279. For the purposes of our decision we limited our opinion on the merits to petitioner's right of refusal to submit its membership lists. This question has been answered by the Supreme Court of the United States in the negative, by holding the petitioner to have a qualified right under the facts appearing before the Court, subject to an overriding interest of the State. The finding of that Court was to the effect that the State of Alabama had failed, at the hearing, to show such an overriding interest and ruled petitioner was not in contempt for failure to produce the lists.

This brings up the second question for review now, viz.: the scope of the order of the trial court and the facts apparent on the face of the record. Petitioner contends that it was held in contempt for refusal to produce its membership lists. As to the petitioner's right of said refusal, the Supreme Court of the United States, as stated, has settled that point, and no further discussion would be proper. However, petitioner's contention as to this sole reason it was held in contempt is not borne out by the record and the Supreme Court of the United States in its opinion, supra, seems to have rested decision on this mistaken premise. We wish to here point out that the record reveals that petitioner was held in contempt for "its willful and deliberate refusal to produce the documents described in the former order of the court in this cause" (orders dated July 25 and July 31, 1956).

Again the record before us shows: "... counsel for respondent objected to the motion to produce and the court

rules, as shown by its order on file, that certain books, papers and documents mentioned in the motion . . . should be brought into court . . . " (Order dated July 25, 1956).

The Supreme Court of the United States, as to the entire order to produce, stated: " . . . petitioner . . . has apparently complied satisfactorily with the production order, except for the membership lists. . . . These last items would not on this record appear subject to constitutional challenge, and have been furnished."

We cannot presume, as did the Supreme Court of the United States, that the petitioner did furnish the other items listed, in view of the finding of the circuit court on the face of its order that it did not; for, as we held in *Ex parte Dickens*, 162 Ala. 272, 50 So. 218 (and approved by the Supreme Court of the United States in its review): "Following the rules above stated, the chancellor has found the facts that said Dickens has not, in good faith, obeyed the orders of the court, but, on the contrary, has filed a false and fraudulent account; and we must take his finding as being correct. Those being the facts, said Dickens was properly adjudged to be in contempt. . . ."

There is nothing in the record here before us upon which we could bottom a conclusion *that petitioner has apparently complied satisfactorily with the production order, except for the membership lists.*

Being so—and pretermitting further discussion of the claimed contempt of petitioner for refusal to submit the membership lists—it is clear the petitioner is still in contempt for its failure to produce the other "certain books, papers and documents" described in the lower court's order, thereby necessitating another affirmance of the judgment.

Petitioner has filed a motion praying that this Court will cause to be sent to the Circuit Court of Montgomery County, Alabama, the mandate of the United States Supreme Court so that petitioner may proceed to have a hearing on the merits of the injunction issued by said Circuit Court.

It results from the foregoing considerations that the motion is not well taken and is overruled and the judgment is again affirmed.

MOTION OVERRULED AND JUDGMENT AFFIRMED AFTER REMANDMENT.

All the Justices concur.